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Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition

JEFFREY M. SCHMITT*

INTRODUCTION

The United States deports hundreds of thousands of immigrants each year,¹ leaving many of the country's eleven million undocumented immigrants living in constant fear of being torn from their families and homes. Because Congress has been unable to address this humanitarian crisis with meaningful legislative reform, President Obama recently announced that his administration will consider changes to its enforcement policy.² By drawing a parallel to the nation's experience with fugitive slave rendition, this Essay argues that President Obama should allow the states to work with U.S. Immigration and Customs Enforcement (ICE) to moderate the implementation of federal enforcement programs.

ICE's Secure Communities program, which seeks to target dangerous criminals for immigration enforcement,³ has generated controversy in part because it operates without input from the states. Because most criminals are prosecuted by state governments, this program necessarily relies on state cooperation to identify and detain undocumented criminals. Many states and localities, however, are concerned that the Secured Communities program encourages racial profiling and discourages immigrants from reporting crimes and cooperating with the police.⁴ They have therefore sought to stop sharing information with ICE and have ended routine compliance with federal requests to hold individuals who have been targeted for immigration enforcement.⁵

This story of state noncooperation closely parallels the nation's experience with the federal Fugitive Slave Act. This Act was unpopular in many northern states that wished to provide protection for free-black residents who were being kidnapped under the guise of fugitive slave rendition. Many states therefore passed personal liberty laws that prohibited state officers from aiding in enforcement and forbade the use of state jails to hold persons claimed as fugitives.

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¹ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FY 2013 ICE IMMIGRATION REMOVALS: ERO ANNUAL REPORT (2013), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>.

² David Nakamura, *Under Pressure, Obama Calls for Immigration-Enforcement Review*, WASH. POST (March 13, 2014, 10:49PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/13/under-pressure-obama-calls-for-immigration-enforcement-review/>.

³ Approximately 20% of all immigration removals take place under Secure Communities. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED 14 (2012), *available at* <http://www.gao.gov/products/GAO-12-708>. In fiscal year 2011, nearly 80,000 individuals were removed under the program. *Id.* at 15 tbl.2.

⁴ *See* HOMELAND SEC. ADVISORY COUNSEL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 24 (2011) [hereinafter TASK FORCE], *available at* <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf>.

⁵ Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 160–62 (2013).

Several scholars have recently argued that these personal liberty laws serve as historical precedent that help justify state noncooperation in programs like Secure Communities.⁶ This scholarship, however, captures only part of the story. Not only can one draw parallels between the personal liberty laws and state resistance to Secure Communities, but the causes of such state resistance are arguably similar as well.

Relying on recent historical literature on the Fugitive Slave Act, this Essay argues that state resistance in both situations has been caused by an exclusively federal regime that has left no policymaking role for the states. Before the federal government occupied the field, many northern states enacted policies designed to moderate the harsh procedures of the Fugitive Slave Act. If given the opportunity, many states would likely do the same today with respect to immigration enforcement. Such state participation would produce better results than the current system of state resistance to broken federal law. When reviewing its enforcement policy, the Obama Administration therefore should consider giving the states greater flexibility to control the implementation of Secure Communities.

This Essay proceeds in three parts. Part I briefly canvasses the history of fugitive slave rendition. Part II provides greater detail on the Secure Communities program and state responses thereto. Part III elaborates on how the nation's experience with fugitive slaves can inform modern immigration enforcement.

I. FUGITIVE SLAVE RENDITION

The Fugitive Slave Clause of the Constitution prohibited northern states from freeing slaves that escaped into their territory. This Clause provided that fugitive slaves “shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”⁷ Although the Clause does not contain an explicit grant of legislative power, Congress enacted the Fugitive Slave Act in 1793.⁸ This Act authorized a southern claimant “to seize or arrest” a fugitive and bring the alleged slave before a state or federal judge or magistrate.⁹ After proving “to the satisfaction of such judge or magistrate” that the person claimed was a fugitive slave, the southern claimant would receive a certificate authorizing the removal of the fugitive from the state.¹⁰ This federal Act, however, did not explicitly require the owner to use such legal procedures or provide penalties for false claims.

Northern congressmen thus sought to pass federal legislation to prevent the kidnapping of free-black residents under the guise of fugitive slave rendition.¹¹ Such proposals were unsuccessful, however, due to opposition from southerners who did not see kidnapping as a

⁶ See generally Lasch, *supra* note 5; Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921 (2012); Craig B. Mousin, *A Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 S. ILL. U. L.J. 285 (2005); James A. Kraehenbuehl, Note, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465 (2011).

⁷ U.S. CONST. art. IV, § 2, cl. 3.

⁸ Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864).

⁹ *Id.* § 3.

¹⁰ *Id.*

¹¹ See 31 ANNALS OF CONG. 829–30 (1818).

serious concern.¹² In fact, southerners unsuccessfully pushed for amendments designed to strengthen the Fugitive Slave Act,¹³ but sectional differences prevented Congress from reaching an agreement on any changes.

Many state governments therefore filled this void by passing statutes designed to prevent the kidnapping of free black residents.¹⁴ Under this cooperative system, federal law governed the rendition of fugitive slaves, whereas state law punished the unlawful kidnapping of black residents. As historian H. Robert Baker has recently argued, the distinction between fugitive rendition and protection from kidnapping “was artificial, but it worked.”¹⁵ The distinction was artificial because both regimes involved an initial determination of whether the claimed individual was in fact a fugitive slave. However, the system worked because both regimes were enforced by state judges and magistrates.¹⁶ In a typical case, the state judge could use state procedures to determine if the claimed individual was a fugitive slave and, if appropriate, use federal procedures to remand the fugitive to the South.¹⁷ Although this system may have angered some in each section who disagreed with rendition or who wished to avoid the use of northern procedures, in practice, the system was relatively successful.¹⁸

In *Prigg v. Pennsylvania*, however, the Supreme Court essentially declared that this system of federal–state cooperation was unconstitutional.¹⁹ The Court in *Prigg* held that the Fugitive Slave Clause granted Congress the exclusive power to legislate for the return of fugitive slaves.²⁰ The Court further held that states could not require slave owners to comply with legal procedures that would limit or delay “the right of the owner to the immediate possession of the slave.”²¹ The Court therefore invalidated all state legislation designed to give procedural protections to persons claimed as fugitive slaves, including the Pennsylvania law before it.

Unable to moderate the harsh procedures of the federal Fugitive Slave Act, a number of northern states passed laws designed to end all state cooperation in fugitive slave rendition.²² These statutes, known as “personal liberty laws,” barred state judges and law enforcement officers from assisting in rendition and prohibited the holding of an alleged fugitive in a state jail. In the six years following *Prigg*, six northern states passed such laws.²³ Because few federal

¹² See 6 ANNALS OF CONG. 1734, 1737 (1796); THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH: 1780–1861*, at 30 (1974).

¹³ See H.R. 18, 15th Cong. (1818).

¹⁴ See generally MORRIS, *supra* note 12.

¹⁵ H. ROBERT BAKER, *PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION* 63 (2012) [hereinafter BAKER, *PRIGG*]; see also H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1142–44 (2012).

¹⁶ See BAKER, *PRIGG*, *supra* note 15, at 63.

¹⁷ See *id.*

¹⁸ See *id.*; STEVEN LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERY ON TRIAL* 29–30 (2010).

¹⁹ 41 U.S. (16 Pet.) 539 (1842).

²⁰ *Id.* at 541–42. In dicta, the Court indicated that states could pass legislation to remove undesirable fugitives under their police powers. *Id.* at 542–43. This dicta became a holding in *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1852).

²¹ *Prigg*, 41 U.S. at 612.

²² Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5, 21 (1979) (asserting that state personal liberty laws were “the most direct Northern reaction to *Prigg*”).

²³ Massachusetts, Vermont, Connecticut, New Hampshire, Pennsylvania, and Rhode Island all passed legislation prohibiting state officials from assisting federal rendition. *Id.* Moreover, Ohio repealed an act, which had required state officials to do so, and New York kept its preexisting personal liberty law intact. *Id.* After the Fugitive Slave Act of 1850 was passed, Ohio, Wisconsin, Maine, and the Minnesota Territory also passed such legislation. *Id.*

officers were available in the states, claimants were usually unable to gain assistance from law enforcement. Although slave catchers sometimes took matters into their own hands, local sympathies often made recovery impractical. The personal liberty laws therefore virtually nullified the Fugitive Slave Act of 1793.²⁴

Southern complaints about northern nullification led to the passage of the Fugitive Slave Act of 1850 as part of a sweeping sectional adjustment known as the Compromise of 1850.²⁵ Instead of bringing the states back into the policymaking process or attempting to make the process more palatable to the North, Congress attempted to empower the federal government to enforce the law in the face of northern resistance.²⁶ Congress therefore followed the Supreme Court's lead by federalizing the rendition of fugitive slaves.

Although the federal government vigorously enforced the Fugitive Slave Act of 1850,²⁷ it was widely perceived to be a failure.²⁸ Throughout its short history, states continued to pass personal liberty laws and, in some areas, state officials even actively interfered with federal enforcement.²⁹ Events like the rendition of Anthony Burns in Boston, which required hundreds of soldiers and drew thousands of protestors, illustrated the danger and expense of attempting to reclaim fugitive slaves in the face of northern hostility.³⁰ With much of the northern population and many state and local governments opposed to the law, effective federal enforcement was virtually impossible.

The nation's history with fugitive slave rendition can be summarized as follows. In the early years, the federal government created the basic rendition framework, and northern states effectively tailored enforcement procedures to satisfy the demands of local populations and protect black residents. After the Supreme Court and Congress took the states out of the policymaking process, however, some state governments ended all cooperation, many northerners resisted federal rendition, and, as a result, the exclusively federal enforcement regime proved to be divisive and ineffectual.

II. SECURE COMMUNITIES

Although immigration law is generally set by the federal government, ICE relies on state cooperation for its Secure Communities program. First launched in 2008, the Secure Communities program seeks to focus enforcement resources on immigrants who commit serious

²⁴ *See id.*

²⁵ Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864). The Compromise of 1850 also addressed sectional differences over slavery in the territories, the admission of California as a free state, and the slave trade in the nation's capital. *See* DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 99–100 (Don E. Fehrenbacher ed., 1976).

²⁶ Most importantly, because many state officers were not cooperating, the Act authorized federal commissioners to enforce the law. *See* Act of Sept. 18, 1850 § 1.

²⁷ *See* STANLEY W. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860*, at 150 (1968).

²⁸ *See, e.g.*, 1 WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 536–37 (1990).

²⁹ The most extreme examples occurred in Wisconsin and Ohio. *See* Jeffrey Schmitt, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1316, 1350 (2007).

³⁰ *See, e.g.*, EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE* 92–94 (2010).

crimes.³¹ Under this program, state officers send booking information on state prisoners to federal officials who determine which prisoners to target for deportation.³² When a state prisoner is so targeted, federal officials issue a detainer asking the state to hold the prisoner until federal immigration officials take custody.³³

Although direct state involvement in the program is fairly limited, it is easy to understand how immigrants confronted with Secure Communities would view local law enforcement as part of the federal immigration enforcement regime. ICE officers use information collected by local law enforcement to determine whom to target for removal. Many immigrants therefore understandably fear that any interaction with local law enforcement officers risks incurring the scrutiny of ICE. As a result, such immigrants are less likely to trust local law enforcement and report crimes.³⁴

Because of this effect on local immigrant communities and concerns about racial profiling, many states and localities have sought to withdraw from participation in the Secure Communities program.³⁵ California, for example, recently enacted the Trust Act, which ends routine compliance with federal requests to enter immigration detainers.³⁶ Such state noncooperation is likely constitutional under the Court's anti-commandeering doctrine, which prohibits the federal government from requiring state executive officers to enforce federal law.³⁷

Some localities have even asked to be excluded from the information sharing system that transmits booking information to ICE. Unlike participation in the detainer process, however, the states likely have no way to avoid the information sharing aspects of Secure Communities. States voluntarily share booking information with the FBI for law enforcement purposes, and, under Secure Communities, the FBI merely shares this information with ICE. Because information sharing between two federal agencies does not implicate the anti-commandeering doctrine, state noncooperation cannot undermine this key aspect of Secure Communities.³⁸

III. LEARNING FROM THE FUGITIVE SLAVE ISSUE

The nation's experience with fugitive slaves should inform modern debates over immigration enforcement. As Christopher Lasch and others have recently noted, the personal liberty laws serve as historical precedent for California's Trust Act and other instances of state noncooperation.³⁹ This existing scholarship, however, tells only part of the story. Although the

³¹ See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited Jan. 20, 2014).

³² See Lasch, *supra* note 5, at 154–55.

³³ See DHS Form I-247, Immigration Detainer – Notice of Action (2012), available at <http://www.ice.gov/secure-communities/pdf/immigration-detainer-form.pdf>.

³⁴ See, e.g., Radha Vishnuvajjala, Note, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J. L. & SOC. JUST. 185, 186 (2012).

³⁵ Lasch, *supra* note 5, at 160–62.

³⁶ See Patrick McGreevy, *Signing Trust Act Is Another Illegal-Immigration Milestone for Brown*, L.A. TIMES (Oct. 5, 2013, 7:36 PM), <http://www.latimes.com/local/la-me-brown-immigration-20131006,0,5441798.story?page=1#axzz2yVmKLU5B>.

³⁷ See *Printz v. United States*, 521 U.S. 898, 933 (1997); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1499–1500 (2006).

³⁸ See TASK FORCE, *supra* note 4, at 13. Professor Kittrie has likewise argued that state policies designed to protect immigrants have limited efficacy. See Kittrie, *supra* note 37, at 1480–84.

³⁹ See sources cited *supra* note 6.

personal liberty laws may provide a guide for how states can deal with an unjust federal law, it is important to recognize that, for many northerners, the personal liberty laws were an imperfect solution. Before the Supreme Court intervened in *Prigg*, many northern states actively participated in the fugitive rendition process by giving free blacks procedural protections to prevent kidnapping. With Congress unable to reach a compromise, individual states passed compromise legislation that satisfied local populations and moderated federal law. It was only after the Court removed the states from the policymaking process that many states withdrew assistance, ultimately resulting in harsh federal enforcement of the Fugitive Slave Act of 1850.

This history suggests that, because Congress is similarly paralyzed in the immigration context, the states should be given a greater policymaking role. States can likely make more of a difference by helping to moderate enforcement policies and procedures than by leaving the issue to ICE officials.

However, just as the Supreme Court cut states out of the rendition regime for fugitive slaves, the Court in *Arizona v. United States* has cast doubt on whether a state can insert itself into the policymaking process for immigration enforcement.⁴⁰ *Arizona* involved a challenge to an Arizona statute designed to vigorously enforce federal immigration law, even in circumstances in which federal officers had decided not to do so. Among other things, the Arizona statute criminalized the failure to comply with federal registration requirements, made it illegal for an unauthorized alien to seek work, and required state officers to verify the immigration status of certain individuals.⁴¹

The Supreme Court broadly held that federal immigration law preempted Arizona's enforcement statute.⁴² As Justice Scalia explained in his dissent, this was not because the Arizona law "excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so."⁴³ Instead, the Court held that Arizona's strict enforcement regime implicitly conflicted with federal enforcement priorities because the state targeted individuals whom the federal government would ignore.⁴⁴ Like *Prigg*, *Arizona* appears to leave little room for independent state policy.⁴⁵

However, because *Arizona* is based on preemption by federal enforcement policies, the case invites President Obama to authorize greater state involvement by changing those policies. The President should accept this invitation. The Fugitive Slave Act of 1850 was a draconian provision designed to empower federal officers to forcefully return fugitive slaves in the face of northern resistance. Rather than repeat this history with unpopular programs run exclusively by ICE, the federal government should learn from this failure and give the states a greater voice in policy discussions over immigration enforcement.

Although specific suggestions are beyond the scope of this Essay, a task force on Secure Communities formed by the Department of Homeland Security has suggested a few options. The task force recognized that, to be successful, ICE must run the Secure Communities "program in

⁴⁰ 132 S. Ct. 2492 (2012).

⁴¹ *Id.* at 2497–98.

⁴² *Id.* at 2510.

⁴³ *Id.* at 2515 (Scalia, J., concurring in part and dissenting in part).

⁴⁴ *Id.* at 2510 (majority opinion).

⁴⁵ Although the states played a large role in shaping immigration law early in U.S. history, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993), the Supreme Court has consistently struck down independent state policy. See Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2088 (2013).

close cooperation with local communities and police leaders.”⁴⁶ For example, the report recommends:

ICE should consider expanding to all states the practice it employs in Colorado, where a panel of state officials, under the direction of the Governor, crafted an agreement to help the state monitor actions under Secure Communities and their impact on state priorities under state law. Under the agreement, which ICE accepted, ICE provides the state with quarterly reports detailing whether identified individuals have been convicted of crimes or are in a noncriminal category of other ICE enforcement priorities.⁴⁷

The report further recommends establishing a panel of independent representatives of local law enforcement and the community to review ICE’s exercise of prosecutorial discretion.⁴⁸ Finally, some members of the task force recommend that the program be suspended until it can be reformed to address the concerns of community leaders and local officials.⁴⁹ The example of fugitive slave rendition fully supports the task force’s recommendations for greater state involvement.

At this time, however, ICE is moving in the opposite direction. The Colorado program discussed above was part of a Memorandum of Agreement (MOA) with ICE.⁵⁰ The ICE website now states: “Because ICE has determined that an MOA with a state is not necessary to activate or operate Secure Communities for jurisdictions within that state, ICE has decided to terminate all existing MOAs.”⁵¹ It further provides: “FACT: State and local jurisdictions cannot opt out of Secure Communities.”⁵² Unfortunately, the federal government is currently forcing states to participate in its enforcement regime rather than seeking local cooperation. President Obama should change course.

CONCLUSION

When considering changes to immigration-enforcement policy, the nation’s experience with fugitive slave rendition suggests that President Obama should seek greater cooperation with the states. In both the immigration and fugitive slave contexts, a polarized Congress was unable to pass meaningful compromise legislation to fix a broken federal system. During the early nineteenth century, the states therefore moderated federal law with supplemental state procedures that made the process more fair and effectual. Until Congress can overhaul our immigration system, the states should be permitted to do the same today.

⁴⁶ TASK FORCE, *supra* note 4, at 29. The report also cautioned that ICE “must be flexible in its implementation of any program involving law enforcement agencies to minimize the risk that its goals might undermine those of local law enforcement or work against community safety.” *Id.* at 25.

⁴⁷ *Id.* at 21.

⁴⁸ *Id.* at 27.

⁴⁹ *Id.* at 8, 27–28.

⁵⁰ See Memorandum of Agreement between U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., and Colo. Dep’t of Pub. Safety (Jan. 6, 2011), *available at* https://www.ice.gov/doclib/foia/secure_communities-moa/colorado-sc-moa.pdf.

⁵¹ *Secure Communities: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/faq.htm (last visited April 6, 2014).

⁵² *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/get-the-facts.htm (last visited April 6, 2014).